

IN THE SUPREME COURT OF THE STATE OF NEVADA

W. RANDALL MAINOR, A
PROFESSIONAL CORPORATION;
RICHARD A. HARRIS, A
PROFESSIONAL CORPORATION;
CLARK SEEGMILLER, A
PROFESSIONAL CORPORATION; AND
ROBERT W. COTTLE, LTD., A
PROFESSIONAL CORPORATION,
INDIVIDUALLY AND COLLECTIVELY
AS THE LAW FIRM OF MAINOR &
HARRIS,
Appellants,
vs.
AMERICAN GUARANTEE AND
LIABILITY INSURANCE COMPANY, A
NEW YORK CORPORATION,
Respondent.

No. 38385

FILED

MAR 04 2003

JANE TTE M BLOC /
CLERK OF SUPREME COURT
BY *J. Ruben*
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from an order granting summary judgment with respect to coverage under a policy of professional liability insurance.

The coverage issue below arose from a lawsuit commenced by the Las Vegas firm of Pico & Mitchell against appellants Mainor & Harris, a professional corporation, W. Randall Mainor, Richard A. Harris, Clark Seegmiller, Robert W. Cottle, and their individual professional corporations (hereinafter Mainor & Harris). The suit sought damages in connection with a dispute between the two firms over fees recovered by Cottle in a personal injury action while employed by Mainor & Harris after his departure as a professional employee of Pico & Mitchell. Cottle had secured the original agreement to represent the injured plaintiffs during his association with Pico & Mitchell and persuaded the clients to continue his retention as counsel upon his new employment with Mainor & Harris.

The Pico & Mitchell suit alleged that Mainor & Harris intentionally interfered with the business relationship that existed between Pico & Mitchell and the plaintiffs in the personal injury case; that Cottle breached his fiduciary duties to Pico & Mitchell by entering into negotiations with Mainor & Harris and diverting clients while still an employee of Pico & Mitchell; that Mainor & Harris and Cottle conspired together to interfere with Pico & Mitchell's economic advantage and to breach Cottle's fiduciary duties; and that Pico & Mitchell was entitled to quantum meruit recovery for the reasonable value of its services to the personal injury plaintiffs.

Respondent, American Guarantee and Liability Insurance Company (American), insured Mainor & Harris against certain exposures to professional liabilities, subject to various exclusionary clauses. After American refused Mainor & Harris's request that American defend and indemnify the firm in connection with the lawsuit, the parties litigated cross-actions concerning coverage in district court. Ultimately, Mainor & Harris effected a million dollar settlement with Pico & Mitchell.

American moved for summary judgment, claiming non-coverage in connection with the Pico & Mitchell suit on the following grounds: The Pico claims did not (1) arise out of the rendition of or failure to render legal services; (2) the claims were excluded by the "Prior Acts Exclusion Endorsement" to the policy; (3) the claims did not sufficiently allege "damages" as defined and covered under the policy; and (4) the claims were excluded from coverage by the "Intentional Acts Exclusion" contained in the policy. The district court, as noted, granted the motion.

Mainor & Harris asserts on appeal that the district court erred in granting summary judgment because genuine issues of material fact remained unresolved with regard to coverage under the policy. We

agree in part and, accordingly, reverse and remand this case for proceedings consistent with this order.

First, genuine issues of fact remain as to whether the actions alleged in the underlying complaint of Mainor & Harris amounted to the rendering of legal services. American relies heavily upon Pico & Mitchell's original complaint against Mainor & Harris to characterize Mainor & Harris's conduct as the wrongful solicitation of Pico & Mitchell's clients; however, Mainor & Harris has consistently argued in its defense that it was providing legal advice to the clients during the transition period in which Cottle changed firms. When reviewing the record in the light most favorable to Mainor & Harris,¹ we conclude that genuine issues of fact remain as to whether Mainor & Harris's alleged wrongful conduct arose out of the rendition of professional services.²

Second, while genuine issues of material fact remain as to whether Mainor & Harris's liability arose out of the rendition of professional services, we conclude that the insurance policy's "intentional acts" exclusion bars coverage to the extent that Mainor & Harris's

¹See Barmettler v. Reno Air, Inc., 114 Nev. 441, 444, 956 P.2d 1382, 1385 (1998) (recognizing that summary judgment is only appropriate if no genuine issues of material fact exist after reviewing the record in the light most favorable to the non-movant).

²If the district court concludes that, after further review, Mainor & Harris's alleged wrongful conduct did not arise out of the rendition of legal services, then the district court need not reach the remaining issues addressed in this order. For guidance in assessing whether Mainor & Harris's conduct amounted to the rendition of legal services, we direct the district court to consider the Nebraska Supreme Court's analysis in Marx v. Hartford Accident and Indemnity Co., 157 N.W.2d 870, 872 (1968) (defining a professional act or service).

potential liability, which led to Mainor & Harris's separate settlement of the underlying suit, is governed by the following exclusionary language:

This policy does not apply: (a) to any judgment or final adjudication based upon or arising out of any dishonest, deliberately fraudulent, criminal, maliciously or deliberately wrongful acts or omissions committed by the insured

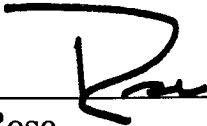
Mainor & Harris argues that the intentional acts exclusion is inapplicable because there was no judgment or final adjudication; however, the "judgment or final adjudication" limitation does not apply when the only theory of Mainor & Harris's liability requires proof of conduct that is covered by the intentional acts exclusion.³ Therefore, to the extent that American can prove that Mainor & Harris's liability arose out of intentionally wrongful conduct, we conclude that American would not be required to provide coverage for that liability.

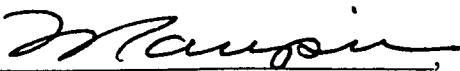
Finally, the plain language of the insurance policy excludes the "restitution of legal fees, costs and expenses" from the types of "damages" recoverable under the policy. However, a genuine issue of material fact remains as to the extent Pico & Mitchell's claims and the resulting settlement represented the restitution of legal fees, costs, and expenses. Accordingly, American's coverage for Mainor & Harris's damages is excluded to the extent that Pico & Mitchell's damages represented restitution for legal fees, costs, and expenses.


Based on the above, we conclude that the district court erred in granting American's motion for summary judgment. Accordingly, we

³See Davis v. Home Ins. Co., No. CIV.95-0094, 1995 WL 380133, at *2 (S.D.N.Y. June 26, 1995) (holding that judgment or final adjudication was not required for exclusion to apply because "the only theory of the insured's liability requires proof of conduct covered by the exclusion").

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.⁴


_____, J.
Rose


_____, J.
Maupin


_____, J.
Gibbons

cc: Hon. Michelle Leavitt, District Judge
Harrison Kemp & Jones, Chtd.
Alverson Taylor Mortensen Nelson & Sanders
Clark County Clerk

⁴We reject Mainor & Harris's claim that coverage extends to the suit as a matter of law under American's coverage for actions taken in a "fiduciary" capacity. It is not alleged and no contention is made that Mainor & Harris's representation of the personal injury plaintiffs arose from services as an "administrator, conservator, receiver, executor, guardian, trustee, or in any similar fiduciary capacity" We also note that the "Prior Acts Exclusion" was limited in scope and must be construed accordingly.